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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

TOM LAN, Plaintiff and Appellant, v. COMCAST CORPORATION, LLC, Defendant and Respondent.	A140039/A140398 (Alameda County Super. Ct. No. RG13681816)

Tom Lan appeals from a judgment (including an attorney fees order) entered against him in the trial court following his appeal of a decision issued by the Labor Commissioner. (See Lab. Code, § 98.2, subd. (a).) He contends the trial court erred because there was substantial evidence to support his claim that respondent owed him commission compensation, a bonus, and waiting time penalties under the Labor Code. He further contends the attorney fees awarded to respondent were in an amount disproportionate to the two-day trial de novo. We will affirm the judgment.

I. FACTS AND PROCEDURAL HISTORY

A. Lan's Job Duties and Compensation

Lan worked for respondent (Comcast) as a Direct Sales Representative (DSR), responsible for selling and promoting Comcast products with a focus on video, high-speed Internet, and phone services.[1] He was expected to perform these responsibilities

[1] Respondent advises that Comcast Cable Communications Management, LLC was erroneously sued as Comcast Corporation, LLC.

primarily by knocking on doors within an assigned territory, but he could also generate business through other approved methods.

Lan's compensation included a base salary and commissions. Commission payments—at issue here—were governed by the Comcast Cable Direct Sales Representative–SFU Sales Compensation Plan (Sales Compensation Plan) and the Comcast Cable California Region Direct Sales Representatives 2012 Sales Integrity Guidelines (Sales Integrity Guidelines).

1. Sales Compensation Plan

Commission payments were calculated using a formula described in the Sales Compensation Plan. Essentially, a commission became *earned* if a DSR's sale resulted in a "connect"—that is, a customer order for new services that was connected for service and activated in the billing system—*and* the service was maintained for a number of days thereafter, as specified in the Sales Compensation Plan.

Comcast provided DSRs with *advances* against these commissions. Payment of advances was expressly conditioned on the first requirement mentioned above: a customer order for new services being processed through to connection and activated in the billing system. If the customer then canceled the service within 90 days of connection or the order was terminated within 120 days of connection due to nonpayment, the advance was subject to a chargeback. Only after the 90-day or 120-day period did the commission become earned.[2]

The Sales Compensation Plan further specified that, except where otherwise noted, the DSR had to be an active Comcast employee to be eligible to receive an advance commission payment. Upon termination from Comcast, the DSR is paid prorated commission compensation "from the date following the end date of the employee's prior

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[2] Section III.A of the Sales Compensation Plan defined "Advance Against Commission Compensation" as "the amount of anticipated Commission Compensation which is advanced to Plan Participants prior to the Commission Compensation being actually earned. Advances against Commission Compensation are not earnings. They are advances against projected future earnings."

performance period to the last day of active employment." The Sales Compensation Plan warned: "The DSR is expected to have taken all steps to ensure that the transaction is properly sold and *connected prior to the termination* in order to be eligible to receive paid commissions on the connect. Transactions that are not properly sold and/or are not connected as of the termination date *are not eligible for Advance commission payout*." (Italics added.)

2. Sales Integrity Guidelines

Lan's commission payments were also subject to the terms of the Sales Integrity Guidelines, which were adopted to prevent fraudulent activities. The Sales Integrity Guidelines provided examples of misconduct and unacceptable sales practices that could result in disciplinary action or termination of employment, including "[g]aining sales through methods that are not approved by management" and "[f]ailing to inform leadership of any known activity which is not in compliance with the Conduct Policy, Code of Conduct, DSR Compensation Plan and/or these Sales Integrity Guidelines."

B. Termination of Lan's Employment for Violation of Comcast Policies

In Summer 2012, Comcast management publicized a policy expressly prohibiting all DSRs from using "customer cancellation lists" in Comcast's database to generate new sales orders. These lists identified potential customers who had signed a service order with a sales representative, but the order had been canceled. The policy prohibiting the use of cancellation lists to generate sales was intended to ensure that no DSR gained an unfair selling advantage over peers. It also allowed the sales representative who placed the initial order an opportunity to save the order and earn the commission.

In October 2012, Comcast initiated an investigation after receiving complaints from coworkers that Lan was continuing to use customer cancellation lists to generate sales. A preliminary review of Lan's sales orders for the prior two performance periods indicated that nearly all of his orders had originally been entered into the system under another sales representative's sales number, and the orders had been canceled a day or two before being reentered under Lan's sales number.

In November 2012, Comcast conducted an investigatory interview in which Lan admitted he was aware of Comcast's policy prohibiting the use of cancellation lists to generate sales, he had nonetheless continued using the cancellation lists for that purpose, he had falsely told his supervisors that he was not doing so, and his supervisors did not know he continued to use the lists. After the interview, Lan confirmed the admissions in written communications to management. He also estimated that over half of his sales derived from calling potential customers whom he had identified using cancellation lists.

By using unapproved lead channels to generate sales in violation of Comcast policies and express management directives, Lan increased his commission receipts in 2012 and deprived other sales representatives of those commission opportunities. Lan's annual benefits base rate (the hourly equivalent rate derived from base compensation and commission compensation) for the 2012 performance year was over $60,000 more than the next highest paid DSR in the office. Between June and November 2012 alone, Lan had been overpaid $69,241.56 in commissions as a result of sales that violated Comcast policies.

Due to Lan's violations of Comcast policies, Lan's employment was terminated effective November 27, 2012.

C. Payments to Lan Upon and After Termination

Upon the termination of his employment, Lan was paid advance commission compensation for all sales orders that were connected before the termination of his employment, in accordance with the Sales Compensation Plan.

In addition, on December 28, 2012, Lan was paid a prorated advance commission payout of $850.92 for sales connected during the period between the end of his last performance period (November 25, 2012) and the termination of his employment (November 27, 2012). He was not paid advance commissions for sales orders that had not been connected as of the date of termination.

Nor was Lan paid a bonus pursuant to a "Cash and Go With HBO" promotion that HBO had sponsored in October and November 2012. Under that promotion, the top five

DSRs, that is, those who accumulated the most "HBO/MAX sales points" during the incentive time frame, were eligible to win a $500 gift card. The terms and conditions of the promotion provided, however, that "[w]inners must be in good standing according to Comcast as well as employed by Comcast during the incentive window and at the time of incentive payout." Although Lan was one of those top five DSRs, he was also under investigation and ultimately terminated for fraudulent sales activities. Comcast therefore determined that Lan was not "in good standing" during the incentive time frame and was ineligible to receive the $500 gift card.

D. Lan's Proceedings Before the Labor Commissioner

Lan filed a claim with the California Labor Commissioner seeking unpaid commissions for sales that had *not* been connected as of his termination date, the $500 award bonus, and statutory waiting time penalties under Labor Code section 203 for failure to pay those amounts.

In May 2013, the Labor Commissioner's hearing officer awarded Lan $604.67 for commissions on sales connected after his termination, $23.35 in interest, and $18,720 for waiting time penalties.

E. Lan's Appeal to the Trial Court

Lan appealed the Labor Commissioner's award to the superior court pursuant to Labor Code section 98.2, subdivision (a). In his notice of appeal, Lan again sought commissions for pending sales that had not been connected by the time of his termination, the $500 gift card, and waiting time penalties.

1. Trial De Novo

A trial de novo was held on August 30 and September 3, 2013. Lan testified on his own behalf, and two witnesses testified on behalf of Comcast. Comcast introduced Defendant's Exhibits A–G, I, L–N, P–R, T, and U, which were admitted. Plaintiff's Exhibits 6, 9, 12, and 16 were marked, but the record does not show they were admitted. Nor does the record on appeal contain the reporter's transcript of the testimony.

2. Trial Court's Decision

The court issued its Decision on September 3, 2013, rejecting all of Lan's claims for unpaid commissions, the $500 gift card, and waiting time penalties.

In contrast to the Labor Commissioner hearing officer, the court found that Lan was paid all wages due upon the termination of his employment, because he had been paid for all orders that had been completed (processed through to connection) through the date of his termination. Under the Sales Compensation Plan, Lan was *not* entitled to advance commissions for orders that were merely pending at the time of his termination and connected only *after* his termination.

Furthermore, the court observed, processing an order through to connection entitled Lan only to an *advance* on a commission, and the commission would not become earned if the customer canceled within 90 days or failed to pay within 120 days. On "most of the sales" for which Lan sought commissions, the orders were either never processed through to connection or, even if connected after Lan's termination, they were later disconnected within the 90-day or 120-day periods anyway.

In addition, for "some of the sales" that Lan *had* been paid advance commissions (because they were connected before Lan's termination), the customer thereafter canceled or failed to pay within the relevant period, such that those commissions never became earned. "In short," the court found, "rather than failing to pay [Lan] all commissions due upon termination, [Lan] was in fact *overpaid*." (Italics added.)

In addition, the court determined that a "large percentage" of Lan's sales in the latter half of 2012 were generated by his unauthorized use of customer cancellation lists that he accessed in violation of Comcast policy. Commissions were not payable on those sales. The court found that Lan's "systematic data mining and solicitation of cancelled customers" increased his 2012 commissions and deprived other sales representatives of the opportunity to earn their commissions; Lan admitted he was aware of Comcast's policy prohibiting the use of customer cancellation lists to generate sales, and lied to his supervisors about continuing to use the cancellation lists; and Lan's excuse that "everyone does it" was impeached by his sales numbers as compared to others. The court decided that Lan's intentional violation of Comcast policies and dishonesty constituted "an alternative ground for concluding that no commissions were due and unpaid as of [Lan's] date of termination" and he was in fact overpaid commissions.

With respect to Lan's claim for the $500 gift card, the court found that Lan had to be an employee in good standing at the time of the award to qualify for the card. Lan was not an employee in good standing at that time, because "he was the subject of an active fraud investigation and terminated for such misconduct."

Based on its findings, the court concluded that judgment should be entered for Comcast.

3. Attorney Fees Award

On November 1, 2013, Comcast filed a motion to recover its attorney fees pursuant to Labor Code section 98.2, subdivision (c). Lan did not file an opposition to the motion, but he appeared at the hearing.

By written order filed on November 26, 2013, the court found that the number of hours spent by Comcast's counsel and counsel's billing rates were reasonable. The court awarded Comcast $40,703.30 in attorney fees.

4. Entry of Judgment

Judgment was entered on November 26, 2013, based on the September 2013 Decision and the order on the motion for attorney fees.[3]

F. Lan's Appeals in This Court

On October 17, 2013, after entry of the Decision but before entry of the judgment, Lan filed a notice of appeal from the "judgment" (A140039).

Also on October 17, 2013, Lan filed a Notice Designating Record on Appeal, requesting preparation of the clerk's transcript but failing to indicate how he wanted to proceed with respect to the record of the oral proceedings in the trial court. In November 2013, Lan filed an Amended Notice Designating Record on Appeal, electing to proceed

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[3] In December 2013, Lan filed a motion for reconsideration of the September 2013 Decision and the attorney fees award. The motion was denied.

by a clerk's transcript and reporter's transcript, but failing to identify any proceeding that he wanted included in the reporter's transcript.

On December 2, 2013, Lan filed a notice of appeal purporting to challenge the "judgment" entered on November 26, 2013 (A140398). Lan's opening brief in this appeal contends this notice was an appeal from the order awarding Comcast attorney fees; under "Case Name" on the second page of the notice of appeal is written "motion for Comcast attorney fees."

On December 19, 2013, Lan filed a motion in the trial court to use a settled statement rather than reporter's transcripts for the oral proceedings (trial de novo) on August 30 and September 3, 2013. The trial court denied the motion. As a result, the appellate record contains neither a settled statement nor a reporter's transcript of the trial de novo.

Lan filed a motion in this court to consolidate appeal number A140039 and appeal number A140398. We granted the motion on April 1, 2014.

II. DISCUSSION

Lan contends the trial court ignored substantial evidence supporting his claims and erred by awarding Comcast too much in attorney fees. His arguments are meritless.

A. Lan Waived His Challenge to the Sufficiency of the Evidence

Lan's challenge to the trial court's decision and order awarding attorney fees is based on the sufficiency of the evidence. He has waived his challenges for two reasons.

First, an appellant has the affirmative duty to show error by an adequate record, and an appeal must be rejected if the appellant fails to provide a record of any portion of the proceedings that might provide grounds for affirmance. (*Maria P. v. Riles* (1987) 43 Cal.3d 1281, 1295-1296 [failure to augment record with settled statement]; *Osgood v. Landon* (2005) 127 Cal.App.4th 425, 435 [failure to provide reporter's transcript].) Here, Lan has not provided a record of the trial de novo or the hearing on Comcast's motion for attorney fees. His challenges are therefore waived. (*Ballard v. Uribe* (1986) 41 Cal.3d 564, 574-575 [appellant's failure to include a transcript or a settled statement of relevant portions of the trial precluded consideration of the merits of the appeal]; *Foust v. San Jose Construction Co., Inc.* (2011) 198 Cal.App.4th 181, 186-187 [appellant's failure to provide exhibits and the reporter's transcript or a suitable substitute was fatal to the appeal]; *Estate of Fain* (1999) 75 Cal.App.4th 973, 992 [failure to provide reporter's transcript precludes challenge as to the sufficiency of the evidence, since it is "presumed that the unreported trial testimony would demonstrate the absence of error"].)

Second, in his opening brief in this appeal, Lan selectively cites the evidence he believes supports his claims, and ignores evidence that supports the judgment. The failure to set forth all material evidence waives a challenge to the sufficiency of the evidence. (*Foreman & Clark Corp. v. Fallon* (1971) 3 Cal.3d 875, 881; *Nwosu v. Uba* (2004) 122 Cal.App.4th 1229, 1246; see Cal. Rules of Court, rule 8.204(a)(2)(C) [appellant's obligation to summarize the significant facts in the record].)

B. <u>Substantial Evidence Supports the Trial Court's Decision</u>

Notwithstanding Lan's failure to provide an adequate record on appeal, the record as it exists provides substantial evidence supporting the court's findings.

1. <u>Sales Not Connected As of Lan's Termination Date</u>

Lan contended he was entitled to commissions for sales that had not been connected as of his termination date. Substantial evidence supports the court's determination to the contrary. The Sales Compensation Plan, admitted into evidence at the trial de novo, expressly stated that commissions were not earned until there was a service connection, and that the service connection would have to take place before the employee's termination from Comcast. Lan was not entitled to commissions for sales that were not processed through to connection by the date of his termination.

Lan argues: "The trial court found that 'most of the sales connected after his termination . . . those customers either did not connect . . . or . . . were later dropped within the 90 to 120 day period . . . .' And, 'some of the sales on which Plaintiff was advanced commissions before termination, the customer cancelled or failed to pay and thus Plaintiff was subject to chargebacks.' . . . The trial judge decision is unclear as it refers to ‘most of the sales . . . ’ or ‘some of the sales . . . ’ but not *all* of the sales. If Lan made even one sale that was connected and stayed connected for 120 days, then Lan’s commission is earned and he is owed unpaid wages for this commission.” (Italics substituted for boldface in original.)

Lan’s argument ignores the court’s finding that Lan “was paid on all completed orders (that is, where service was connected) through his date of termination,” and “*[t]he sales on which he claims commissions were due were connected after* termination or merely pending.” (Italics added.) The court therefore found that *all* sales for which he sought commissions were not connected by the termination date, not just “most” or “some.”

Indeed, Lan misperceives what the court was saying. By its reference to “most” of the sales, the court was simply pointing out that *not only* were the orders not processed to connection by the date of his termination, most of them were never connected or, if connected *after* his termination, were later dropped within the 90-day or 120-day period, so Lan would not have been entitled to commissions on them anyway. By its reference to “some of the sales,” the court articulated that, “on some of the sales on which [Lan] was advanced commissions before termination, the customer cancelled or failed to pay and thus [Lan] was subject to chargebacks.” In other words, Lan received advance commissions that never became earned. These unearned advances could not be charged back against future advances because, by that time, Lan had been terminated, and as a result, Lan was actually overpaid.

Lan also argues that “[e]ight of Lan’s sales in his claim was [*sic*] connected after his termination date of November 27, 2012 and stayed connected for over 120 days.” But Lan’s acknowledgment that the sales “connected *after* his termination date” confirms that Comcast did not owe him commissions for them. In addition, as evidence that the eight sales were connected and stayed connected, Lan cites to Plaintiff’s Exhibits 12, 14, 15, 16, and 17. Plaintiff’s Exhibits 14, 15, and 17 were not marked or admitted at trial. Plaintiff’s Exhibits 12 and 16 were marked, but there is no indication they were admitted, and, in any event, they are contradicted by Defendant's Exhibit L, which was admitted and which Lan ignores.

Lan makes additional arguments based on the proceedings before the Labor Commissioner's hearing officer. Our task here, however, is to review the trial court's determination based on the evidence before the trial court, not the Labor Commissioner. (*Nordquist v. McGraw-Hill Broadcasting Co.* (1995) 32 Cal.App.4th 555, 560-561 [Labor Commissioner's findings were entitled to no weight, because appellate review is of the facts presented to the trial court]; *Hernandez v. Mendoza* (1988) 199 Cal.App.3d 721, 725 [on appeal from superior court's decision after trial de novo pursuant to Lab. Code, § 98.2, "review is accorded to the facts presented to the superior court and not to the decision of the commissioner"]; *Sales Dimensions v. Superior Court* (1979) 90 Cal.App.3d 757, 763.)

2. Lan Was Overpaid Based on Sales in Violation of Policy

As an alternative ground for finding that no commissions were due and unpaid as of the date of termination, the court found that Lan had been overpaid due to his mining of customer cancellation lists in violation of Comcast policies. The finding was supported by Comcast's evidence that Lan had been overpaid for this reason by at least $69,241.36.

Lan does not address the court's finding in his opening brief on appeal. Although he discusses it to some extent in his reply brief, his arguments are untimely and unpersuasive. (*REO Broadcasting Consultants v. Martin* (1999) 69 Cal.App.4th 489, 500 (*REO Broadcasting*) [matters raised for the first time in an appellate reply brief are not considered without a showing of good cause].) Because Lan does not refute this alternative ground for the court's decision, he fails to show that the judgment must be reversed.[4]

[4] We have fully considered all of the other arguments in Lan's reply brief and find them unavailing.

3. Lan Was Ineligible for the $500 Award Bonus

The court denied Lan's claim for a $500 award bonus due to Lan not being "an employee in good standing at the time of the award." The court's finding is supported by Defendant's Exhibit G, which includes an email and an attachment setting forth the terms of the promotion, including that "[w]inners must be in good standing *according to Comcast* as well as employed by Comcast during the incentive window and at the time of incentive payout." (Italics added.) It is further supported by Comcast's Exhibits D, E, F, and I, evincing that Lan was under investigation for fraudulent sales activities and ultimately terminated for such activities during the incentive window.

Lan argues that Comcast emailed him before his termination, informing him that he was entitled to the $500 bonus. The email on which he relies, which he identifies as Plaintiff's Exhibit 8, was not admitted into evidence at the trial de novo and is therefore immaterial. In any event, although the email identified him as a "winner" based on the number of points he acquired, it fails to negate the substantial evidence supporting the court's determination that he was not *entitled* to the award under the terms of the promotion.

4. Lan Was Not Entitled to Waiting Time Penalties for an $850.92 Payment

Labor Code section 203 provides in part: "If an employer willfully fails to pay . . . in accordance with [Labor Code section 201] . . . any wages of an employee who is discharged[,] . . . the wages of the employee shall continue as a penalty from the due date thereof at the same rate until paid or until an action therefor is commenced . . . ." Because the court did not err in deciding Lan was not due additional commissions or the $500 bonus, there is no basis for concluding that Comcast violated Labor Code section 203.

In his opening brief in this appeal, however, Lan makes a new argument based on a check he received from Comcast for $850.92 after he was terminated. Since he received this check on December 28, 2012, and his employment was terminated on November 27, 2012, he concludes that Comcast "willfully" failed to pay his "final wages" until December 28 in violation of Labor Code section 201, thereby triggering waiting time penalties under Labor Code section 203. The argument is unavailing.

In the first place, Lan did not claim waiting time penalties for the $850.92 payment in his notice of appeal to the trial court or during the trial de novo. Obviously, he cannot establish that the court's Decision is erroneous based on an issue he failed to present. (*Hepner v. Franchise Tax Bd.* (1997) 52 Cal.App.4th 1475, 1486; *Rossiter v. Benoit* (1979) 88 Cal.App.3d 706, 712 (*Rossiter*).) And although Lan later raised the issue in his untimely motion for reconsideration, he does not challenge the denial of his reconsideration motion in his opening brief on appeal. We therefore have no obligation to consider the issue further. (*REO Broadcasting*, *supra*, 69 Cal.App.4th at p. 500.)

In any event, the $850.92 payment was not for unpaid wages within the meaning of Labor Code section 203. That statute pertains to wages that were not paid in accordance with Labor Code section 201. Labor Code section 201 requires immediate payment of the "wages *earned*" at the time of discharge. (Italics added.) But as indicated by Defendant's Exhibit L, the $850.92 was not for earned wages, but for prorated *advance* commission compensation for five completed orders between November 25 and 27, 2012. Because these orders had not remained active and fully paid for 120 days, the commission had not become "earned" under the terms of the Sales Compensation Plan. (See *Koehl v. Verio, Inc.* (2006) 142 Cal.App.4th 1313, 1330 [right to a commission depends on the terms of the contract for compensation].)

C. Attorney Fees

Lan contends the court awarded Comcast too much in attorney fees under Labor Code section 98.2, subdivision (c) because the trial lasted only two days. His contention is waived because it is not supported by legal authority, citations to the record, or sufficient argument. (*People v. Stanley* (1995) 10 Cal.4th 764, 793; *Rossiter, supra*, 88 Cal.App.3d at p. 710; see Cal. Rules of Court, rule 8.204(a)(1)(B).) Moreover, he fails to show the court erred in finding that the hours and hourly rate claimed by Comcast were reasonable.

Lan has failed to demonstrate error.[5]

III. DISPOSITION

The judgment is affirmed.

NEEDHAM, J.

We concur.

SIMONS, Acting P.J.

BRUINIERS, J.

[5] In September 2014, Comcast filed a motion in this court seeking sanctions against Lan and his attorney for filing a frivolous appeal. We gave notice that we were considering the imposition of sanctions and provided Lan and his attorney the opportunity to file an opposition to the motion. Lan's attorney filed an opposition contending the appeal was not frivolous because Lan had prevailed before the Labor Commissioner and the references in the opening brief to matters outside the record were due to counsel not having the entire record. We hereby deny the motion.